Supreme Court, U.S.
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PUBLIC COPY

No.

IN THE

Supreme Court of the United States

GEORGE DOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petition untimely where a 12-year-old was convicted on October 22, 1999 and filed a Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 USCA §2255 on April 11, 2003?

2. Was petitioner denied due process guaranteed by the Fourteenth Amendment to the U.S. Constitution where his conviction was obtained by a plea of guilty and where at the time of the alleged commission of the crime, he was a juvenile, incompetent because of age, 11 at the time?

3. Was the petitioner denied effective assistance of counsel guaranteed by the Sixth Amendment to the U.S. Constitution where despite during court proceedings the court expressed doubts concerning his plea of guilty and his role in the alleged conspiracy, psychological exams expressly state petitioner was not mentally competent to aid in the assistance of his attorney, and the petitioner had been housed with his co-defendant who had associated with the "Bloods," a nationwide gang, and was court savvy, petitioner's counsel advised petitioner to plead guilty?

PARTIES TO THE PROCEEDING

Petitioner:

This is a criminal appeal which was sealed in the lower courts because of the age of the petitioner at the time of the alleged crime, 11 at the time.

On October 22, 1999, petitioner entered a plea of guilty to three counts of possessing hand guns in violation of Title 18, U.S.C. § 922X, 2A and 2, who at the time had not reached the age of eighteen (18).

Petitioner received a sentence of incarceration until he reaches the age of twenty-one at which time he has been ordered to undergo a psychological examination to determine whether he is competent to be released.

On April 11, 2003, petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 U.S.C. §2255.

On June 3, 2003, the United States District Court, Eastern District of Arkansas, Western Division, entered an Order finding that the petitioner's motion was untimely and was hereby dismissed. The lower court also found that "petitioner's reliance on Massaro v. United States, 123 S.Ct. 1690 (2003) is misplaced."

Petitioner is currently incarcerated in the federal prison system. He was the defendant in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent:

The United States of America.

There are no other parties to this action

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The December 17, 2003, *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is filed under seal and is reprinted at App. 6a. The October 20, 2003, Eighth Circuit panel opinion is filed under seal and is reprinted at App. 1a. The June 3, 2003, order of the United States District Court for the Eastern District of Arkansas, Jonesboro Division, is filed under seal and reprinted at App. 2a.

JURISDICTION

The Eighth Circuit issued its *en banc* opinion on December 16, 2003. The petition for certiorari is timely in that Petitioner has filed it within 90 days of December 16, 2003. The Court has jurisdiction pursuant to 28 USCA § 1254.

RELEVANT PROVISIONS

This case involves the interpretation and application of 28 USCA § 2255, the Sixth Amendment to the United States Constitution guaranteeing a criminal defendant the right to effective assistance of counsel, and the due process clause of the Fourteenth Amendment.

28 USCA § 2255

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or

> laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT

All proceedings were sealed because the Petitioner was a juvenile.

On October 22, 1999, in the U.S. District Court, Eastern District of Arkansas, Petitioner entered a plea of guilty to three counts of possessing hand guns in

violation of Title 18, U.S.C. § 922X, 2A and 2, who at the time had not reached the age of eighteen (18).

Petitioner received a sentence of incarceration until he reaches the age of twenty-one at which time he has been ordered to undergo a psychological examination to determine whether he is competent to be released.

On April 11, 2003, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 U.S.C. § 2255.

On June 3, 2003, the U.S. District Court, Eastern District of Arkansas, entered an Order finding that the Petitioner's motion was untimely and was hereby dismissed. The lower court also found that "petitioner's reliance on Massaro v. United States, 123 S.Ct. 1690 (2003) is misplaced."(App. 2a)

On June 16, 2003, Appellant filed a Notice of Appeal.(App. 7a)

On June 24, 2003, the lower court (district court) entered an Order denying the request for a certificate of appealability. The lower court found that Petitioner had not made a substantial showing of denial of a federal constitutional right.(App. 9a)

On October 20, 2003, the Eighth Circuit Court of Appeals, consisting of a panel comprised of Morris Sheppard Arnold, McMillian and Smith, denied the application for a certificate of appealability.(App. 1a)

The Eighth Circuit Court of Appeals issued its *en banc* opinion on December 17, 2003 affirming the panel decision. (App. 6a)

At the time of the alleged commission of the crime, the Petitioner was a juvenile, incompetent because of age, 11, d/o/b 5-25-86. Prior to the plea hearing, Petitioner was housed with the co-defendant, at the Alexander Youth Services Center, the juvenile unit of the Arkansas Department of Correction. Petitioner and the co-defendant were not just at the same unit, but were allowed to associate freely with each other and other juveniles. As an eleven year old, Petitioner was not only an incompetent, but was subjected to continued duress by the co-defendant, a much older, sophisticated, street wise juvenile, who continued his influence on Petitioner throughout the plea and sentencing process. See Dr. Wrenda B. Gallien's report at App. 11a and Dr. Sally Johnson's statement which is contained in the record.

The prosecution failed to disclose to Petitioner's court appointed attorney, the co-defendant's psychological exam and his testimony from court proceedings.

The district court denied Petitioner's request for the co-defendant's testimony and records from court proceedings, including psychological examinations to aid Petitioner in his quest herein.

Only by reading the deposition of the co-defendant in the civil matter did Petitioner's present counsel learn of the co-defendant's past gang related activities involving the "Bloods" and his apparent

sophistication and knowledge of the court system. Because of the lack of knowledge of all existing exculpatory evidence, Petitioner's counsel was prevented from advising and defending Petitioner.

Numerous times during district court proceedings, the court expressed doubts concerning Petitioner's plea of guilty and role in the alleged conspiracy. Psychological exams of Petitioner expressly state that he was not mentally competent to aid in the assistance of his attorney. The court noted the sophistication of the co-defendant. The court stated that it was unable to accept the plea of Petitioner and the government would be required to make its case. Petitioner was never allowed to present the defenses of incompetency, duress during the commission of the crime, and duress during incarceration in close proximity with the co-defendant. Despite the statements made by the district court, court appointed counsel for Petitioner insisted on taking a recess wherein it is presumed that Petitioner was counseled on pleading guilty. Only with leading questions by Petitioner's counsel, and arguments by his counsel for the court to accept the plea, did the district court finally accept his plea. Prior to the plea, Petitioner's parents and Petitioner had been informed by his counsel that three options for sentencing were available to the court: 1) home detention, 2) boarding school and 3) foster care. Immediately prior to entering a plea of guilty, Petitioner's counsel informed Petitioner and his parents that these options were not available. Petitioner was prohibited from presenting the defenses of incompetency, insane (mental disease or defect) and not only duress but that the facts did not warrant a finding of guilty of the charges.

Petitioner did not appeal any of the proceedings in district court because he had pled guilty on the advice of his court appointed attorney. His parents later retained counsel to represent Petitioner in his Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 USCA § 2255.

Petitioner has been incarcerated 1,091 miles from the residence of his parents which violates his rights to rehabilitation. During sentencing, Dr. Sally Johnson, Medical Center, Butters, North Carolina, recommended, and the district court concurred, that the parents' involvement in Petitioner's rehabilitation was essential. Because of the distance of Petitioner's incarceration from his parents, their participation in Petitioner's rehabilitation has been thwarted.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals' decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's supervisory power . . . ."

All of these considerations are present in this case. Petitioner was 12 years old when he entered a plea of guilty to criminal charges in federal court (based on conduct that occurred when Petitioner was 11 years old) based on the advice of his court appointed attorney. Obviously, no appeal was filed on his behalf. Subsequently, Petitioner's parents retained the services of counsel and filed a Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 USCA § 2255. The district court held that Petitioner's motion was untimely. This decision was upheld by the Eighth Circuit Court of Appeals.

Petitioner's arguments fall under the umbrella of denial of due process under the Fourteenth Amendment to the U.S. Constitution and the right to effective assistance of counsel guaranteed by the Sixth Amendment.

The decisions of the lower courts conflict with Massaro v. United States, 123 S.Ct. 1690 (2003), Slack v. McDaniel, 120 S.Ct. 1595 (2000), Cox v. Norris, 133 F.3d 565 (8th Cir. 1997), and Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997). Since the decisions of the lower courts herein, the District Court of Appeal of Florida, Fourth District, in Tate v. State of Florida, 2003 WL 22900994 (Fla.App. 4 Dist.), held that due process rights of a first-degree murder defendant, who was twelve years old at the time of his offense, were violated by the trial court's failure to order, sua sponte, pretrial competency evaluation; defendant's mental age was nine or ten years and his I.Q. was 90 or 91, defendant lacked previous exposure to the judicial system, proceedings were complex, and defendant's

immaturity and developmental delays were at the heart of his defense. U.S.C.A. Const. Amend. 14; West's F.S.A. RCrP Rules 3.210, 3.211.

Consideration by the full court is therefore necessary to secure and maintain uniformity of the courts' decisions.

The Court's review is warranted for all of these reasons.

As stated previously, Petitioner's arguments fall under the umbrella of denial of due process under the Fourteenth Amendment to the U.S. Constitution.

On October 22, 1999, Petitioner entered a plea of guilty to three counts of possessing hand guns in violation of Title 18, U.S.C. § 922X, 2A and 2, who at the time had not reached the age of eighteen (18).

Petitioner received a sentence of incarceration until he reaches the age of twenty-one at which time he has been ordered to undergo a psychological examination to determine whether he is competent to be released.

On April 11, 2003, Petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody pursuant to 28 U.S.C. §2255.

On June 3, 2003, the United States District Court, Eastern District of Arkansas, entered an Order finding that the Petitioner's motion was untimely and was hereby dismissed. The lower court also found that

"petitioner's reliance on Massaro v. United States, 123 S.Ct. 1690 (2003) is misplaced."

I. REVIEW IS WARRANTED BECAUSE THE DECISION OF THE LOWER COURTS IS CONTRA TO A DECISION OF THIS COURT, MASSARO V. UNITED STATES, 123 S.CT. 1690 (2003).

In a unanimous decision, Massaro v. United States, 123 S.Ct. 1690 (2003), the Supreme Court rejected limits on appeals for convicted criminals, giving them more time to claim bad lawyering put them in prison. The Supreme Court said a convicted hit man could claim ineffective counsel in a second round of appeals, even though he did not initially bring up the issue.

In speeches, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have expressed concern about the quality of lawyers available to poor defendants facing the death penalty.

The Massaro decision did not concern a death sentence. The ruling allowed lower courts to consider an appeal from Joseph Massaro, described by prosecutors as a "soldier" in the Luchese organized crime family that controlled an extortion ring involving Long Island topless bars, gambling and loansharking.

Justice Anthony M. Kennedy said an appeals court was wrong to rule that Massaro couldn't pursue his appeal. Kennedy, writing for the majority, said that a limit would speed resolution of some bad lawyering claims, but it also would make it harder to raise them.

The lower court's ruling that Petitioner's motion pursuant to 28 U.S.C. §2255 was untimely violates the spirit and the intent of the Massaro decision.

II. REVIEW IS WARRANTED TO RESOLVE THE CONFUSION OF THE LOWER COURTS CONCERNING JUVENILES AND THE ISSUE OF COMPETENCY.

III. REVIEW IS WARRANTED BECAUSE PETITIONER, AN 11-YEAR-OLD JUVENILE, WAS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT.

Petitioner's denial of due process argument overlaps the denial of his 28 USCA § 2255 motion as well as his claim of ineffective assistance of counsel. However, since the due process claim also involves the ineffective assistance of counsel claim, these arguments are incorporated below.

Petitioner pled guilty with the advice of counsel. The crux of Petitioner's motion centers around whether the conviction was obtained voluntarily with the understanding of the nature of the charges and consequences of the plea and, thus, the denial of effective assistance of counsel. The subsequent clarification in the law by Arkansas statute leaves no doubt that the Appellant was incompetent because of his age at the time of the alleged crime. The basis of Petitioner's allegation that he received ineffective assistance of counsel was his court appointed attorney's

assertion during the colloquy between the lower court and Petitioner's court appointed attorney:

> THE COURT: Ms. Fowler, for the record, what is your position regarding juvenile male to participate effectively and to assist you as well?
>
> MS. FOWLER: Your Honor, I have spoken with him today, and I'm confident that he is competent to proceed and to assist me.

Following are various decisions of state and federal courts concerning varied interpretations of the habeas corpus statutes.

Counsel who failed to file postconviction relief motion for his client in spite of being specifically directed by his client's representatives, who met with counsel in same month client's conviction and sentence were affirmed on appeal, to file a "2255," violated a basic duty of an attorney to his client by refusing to do what was requested by his client on such a fundamental matter. Baldayaque v. U.S., C.A.2 (Conn.) 2003, 338 F.3d 145.

Between the hearing for the plea and the hearing for sentencing, Petitioner's parents approached the district court with their dissatisfaction of the court appointed attorney's representation of their minor son. A hearing was held concerning this issue. The Petitioner and his parents were rural Arkansas natives with little or no court experience. The plea of guilty obtained by the advice of court appointed counsel alone

substantiates the claim of ineffective counsel. Because of the previous plea of guilty and the disagreement between Petitioner's court appointed counsel and his parents, no post sentencing proceedings or appeal was filed despite the court appointed attorney remaining as Petitioner's attorney of record for approximately three years after sentencing.

District court erred in summarily dismissing defendant's motion to set aside conviction, which was based on counsel's alleged ineffectiveness at guilty plea hearing, where defendant may have had factual basis for his reluctance to plead guilty, record did not preclude finding that content of counsel's advice to defendant fell below required range of competence, and there was reasonable probability that defendant would have gone to trial if not for counsel's advice. U.S. v. Nahodil, C.A.3 (Pa.) 1994, 36 F.3d 323.

Defendant demonstrated cause for prejudice from failure to raise issue that government breached plea agreement and, therefore, could bring motion to correct sentence; counsel failed to advise defendant of right to appeal sentence and rendered ineffective assistance by failing to bring claim of breach of plea agreement to district court's attention at sentencing, and sentence would have been lower had issue been raised. U.S. v. De la Fuente, C.A.9 (Guam) 1993, 8 F.3d 1333.

Shortly before the plea was entered, court appointed counsel for the Petitioner informed the Petitioner and his parents that the original plea agreement with the prosecutor had been revoked. Prior to the plea, Petitioner's parents and Petitioner had

been informed by Petitioner's court appointed counsel that three options for sentencing were available to the court: 1) home detention, 2) boarding school and 3) foster care. Immediately prior to entering a plea of guilty, Petitioner's court appointed counsel informed Petitioner and his parents that these options were not available.

Defendant denied effective assistance by performance of counsel during plea negotiations, including counsel's failure to inform defendant of impact of Sentencing Guidelines, was entitled to remedy of vacation of sentence and resentencing. U.S. v. Busse, E.D.Wis.1993, 814 F.Supp. 760.

Defendant received ineffective assistance of counsel if defendant did not consent to trial counsel's failure to file notice of appeal, regardless of facts that defendant was convicted pursuant to guilty plea rather than at trial, that he was satisfied with his attorney at time of sentencing, and that sentencing court advised him of his right to appeal. U.S. v. Stearns, C.A.9 (Or.) 1995, 68 F.3d 328.

Because of Petitioner's age and lack of court sophistication, he lacked the competency to enter into a plea of guilty at the time.

Remedy for ineffective assistance of counsel received by federal habeas petitioner when defense counsel fails to make requested direct appeal, resulting in per se violation of petitioner's Sixth Amendment right, is to provide petitioner with right to appellate proceeding, as if on direct appeal, with assistance of

counsel. Castellanos v. U.S., C.A.7 (Ill.) 1994, 26 F.3d 717.

Petitioner adequately raised claim of ineffective assistance of counsel in postconviction petition; petitioner alleged he withdrew appeal because of "conflict of interest" with his attorney and attorney's "ineffective" appeal of only the sentence enhancement, and that he would not have pleaded guilty had his attorney not given him incorrect advice. Barker v. U.S., C.A.7 (Wis.) 1993, 7 F.3d 629, certiorari denied 114 S.Ct. 939, 510 U.S. 1099, 127 L.Ed.2d 229.

The conviction was obtained by a plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charges and the consequences of the plea.

At the time of the alleged commission of the crime, the Petitioner was a juvenile, incompetent because of age, 11. Since the alleged commission of the crime, Petitioner was housed with the co-defendant, at the Alexander Youth Services Center, the juvenile unit of the Arkansas Department of Correction. Petitioner and the co-defendant were not just at the same unit, but were allowed to associate freely with each other and other juveniles. As an eleven year old, Petitioner was not only an incompetent, but was subjected to continued duress by the co-defendant, a much older, sophisticated, street wise juvenile, who continued his influence on Petitioner throughout the plea and sentencing process. See Dr. Wrenda B. Gallien's report at App. 11a and Dr. Sally Johnson's statement which is contained in the record.

The conviction was obtained by an unconstitutional failure of the prosecution to disclose to the Petitioner evidence favorable to him.

The prosecution failed to disclose to Petitioner's court appointed attorney, the co-defendant's psychological exam and his testimony from court proceedings.

To date, the district court has denied present counsel for Petitioner his request for court related documents relating to the co-defendant or Dr. Sally Johnson's psychological exam of Petitioner. Certain matters only became known to Petitioner's present attorney after reviewing the co-defendant's deposition taken in civil court proceedings. Only by reading the deposition of the co-defendant in the civil matter did Petitioner's present counsel learn of the co-defendant's past gang related activities involving the "Bloods" and his apparent sophistication and knowledge of the court system. Because of the lack of knowledge of all existing exculpatory evidence, Petitioner's counsel was prevented from advising and defending Petitioner.

Petitioner was denied effective assistance of counsel. Numerous times during district court proceedings, the court expressed doubts concerning Petitioner's plea of guilty and role in the alleged conspiracy. Psychological exams of Petitioner expressly state that he was not mentally competent to aid in the assistance of his attorney. The district court noted the sophistication of the co-defendant. The district court stated that it was unable to accept Petitioner's plea and the government would be required to make its case. Petitioner was never allowed to

present the defenses of incompetency, duress during the commission of the crime, and duress during incarceration in close proximity with the co-defendant. Despite the statements made by the district court, court appointed counsel for Petitioner insisted on taking a recess wherein it is presumed that Petitioner was counseled on pleading guilty. Only with leading questions by Petitioner's court appointed counsel, and arguments by his court appointed counsel for the court to accept the plea, did the district court finally accept his plea. Prior to the plea, Petitioner's parents and Petitioner had been informed by Petitioner's court appointed counsel that three options for sentencing were available to the court: 1) home detention, 2) boarding school and 3) foster care. Immediately prior to entering a plea of guilty, Petitioner's court appointed counsel informed Petitioner and his parents that these options were not available. Petitioner was prohibited from presenting the defenses of incompetency, insane (mental disease or defect) and not only duress but that the facts did not warrant a finding of guilty of the charges.

Petitioner was denied the right of appeal because of the denial of effective assistance of counsel. Because of Petitioner's incompetency (age at the time) and lack of understanding of the judicial system, he should not be held accountable for statutes of limitation.

Petitioner has been denied material elements of rehabilitation as recommended and which was consideration upon which a guilty plea was obtained.

Petitioner has been incarcerated 1,091 miles from the residence of his parents which violates his

rights to rehabilitation. During sentencing, Dr. Sally Johnson, Medical Center, Butters, North Carolina, recommended, and the district court concurred, that the parents' involvement in Petitioner's rehabilitation was essential. Because of the distance of Petitioner's incarceration from his parents, their participation in his rehabilitation has been thwarted.

Petitioner was denied due process in not being allowed the defense of temporary mental insanity.

Petitioner's basis for contentions of denial of effective assistance of counsel and certain events and consequences did not become apparent until after statutory periods of time for appeal. Although Petitioner's court appointed attorney, during the plea and sentencing, remained as attorney of record, no appeals or writs of habeas have been filed prior to this attorney being substituted as the attorney of record. Further, Petitioner was incompetent at the time of the alleged commission of the crimes and allegedly was incompetent by law during his plea because of his age at the time and his lack of the understanding of the proceedings and the ability to aid his counsel.

At the time of Petitioner's plea in federal court, Arkansas allowed adults charged in circuit court to argue lack of fitness to proceed, also called competency, and not guilty by reason of mental disease or defect. Ark. Code Ann. § 5-2-312(a) (Repl. 1998) states that "it is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged, he lacked capacity as a result of mental disease or defect to conform his conduct to the requirements of law or to appreciate the criminality of his conduct."

The Arkansas Supreme Court reversed the state trial court's decision not to allow competency to stand trial. Petitioner's previous counsel's failure to pursue the issue of competency in federal court after approval by the Arkansas Supreme Court is a major argument of Petitioner for ineffective assistance of counsel. Soon after sentencing in 1998, the Arkansas Legislature passed into law Act 1999, Ark. Code Ann. 9-27-502 which states in part:

> (b)(1)(A) For a juvenile under the age of thirteen (13) at the time of the alleged offense and who is charged with; capital murder, § 5-10-101, or murder in the first degree, § 5-10-102, there shall be a presumption that:
>
> (i) The juvenile is unfit to proceed; and
>
> (ii) He or she lacked capacity to:
>
> (a) Possess the necessary mental state required for the offense charged;
>
> (b) Conform his or her conduct to the requirements of law; and
>
> (c) Appreciate the criminality of his or her conduct.
>
> (B) The prosecution must overcome these presumptions by a preponderance of the evidence.
>
> (2)(A) For such juveniles under the age of thirteen (13) and who are charged with capital murder, § 5-10-101, or murder in the first degree, § 5-10-102, the court shall order an evaluation to be performed in accordance with § 5-2-305(b) by a psychiatrist or a clinical psychologist

> who is specifically qualified by training and experience in the evaluation of juveniles.
>
> (B) Upon an order for evaluation, all proceedings shall be suspended and the period of delay until the juvenile is determined fit to proceed shall constitute an excluded period for the speedy trial provisions of Rule 28 of the Arkansas Rules of Criminal Procedure.

The Arkansas state court considered, ordered, adjudged and decreed that it's Order of August 11, 1998, be reaffirmed and adopted as the final disposition in another matter, and the Order was entered nunc pro tunc as of December 6, 2000. The Arkansas state court incorrectly sentenced the Petitioner under the new 1999 law when the alleged crime occurred on March 24, 1998. This is relevant because the federal court obviously followed what it believed to be Arkansas law concerning sentencing and jurisdiction of juveniles. If the Arkansas state court erred in sentencing then the federal court compounded the error.

The Petitioner was denied a jury trial because of his status as a juvenile. The given rationale is that because juveniles cannot be sentenced past the age of eighteen (in 1998) and twenty-one (in 1999), then the juvenile gave up the right to a jury trial. Because of the law concerning sentencing of juveniles, the right of the juvenile to claim incompetence is crucial. The failure of the exercise of this right by his counsel is a denial of due process. The juvenile, being incompetent at the time of the plea, not only in the opinion of various psychiatrists, but by law, albeit retroactive from the

year 1999, was not competent to waive this right and enter a plea of guilty. The fact that the courts, Arkansas as well as federal, sentenced the Petitioner under the law as it existed in 1999 for an alleged crime that occurred in 1998, is another argument that Petitioner should have been entitled to claim the incompetency defense.

The district court sentenced Petitioner as follows:

> ". . . be committed to the custody of the Bureau of Prisons for imprisonment until he's 21, until his 21st birthday on Count One, twelve months on Count Three, and this sanction is to run concurrently with One, and 60 months on Count Two, which will run consecutively. The sentence will run concurrently to the undischarged term at Alexander that he's currently serving, and inasmuch as the court is highly impressed with the evaluation of Dr. Johnson, I'm going to recommend that [Appellant] be afforded counseling and whatever treatment is needed to deal objectively with the concerns expressed by Dr. Johnson in her forensic evaluation."

Did Count III run consecutive to Count I or II? If Count I, then Petitioner was sentenced until age 26 which was further error.

The district court obviously followed what it believed to be the law in Arkansas concerning juveniles based on the sentence given by the Arkansas court

which maintained jurisdiction over Appellant until the age of twenty-one (21). However, this was error. At the time of the alleged crime, March 24, 1998, the State of Arkansas retained jurisdiction over juveniles until the age of eighteen (18) in criminal matters. In 1999, Arkansas, by statute, retained jurisdiction until the age of twenty-one (21) over juveniles in criminal matters. It is obvious that not only Arkansas but the district court incorrectly sentenced the Petitioner under the law as it existed in 1999 when the alleged crime occurred in 1998. This was error and a denial of Petitioner's constitutional rights and due process.

Slack v. McDaniel, 120 S.Ct. 1595 (2000), cited by the district court in dismissing Petitioner's motion on procedural grounds, states in part:

> Habeas petition was dismissed by the United States District Court for the District of Nevada, and certificate of probable cause (CPC) was denied by the District Court and the United States Court of Appeals for the Ninth Circuit. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements found therein, regardless of whether the habeas petition was filed in the district court before or after

AEDPA's effective date; (2) when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue if the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling; and (3) a habeas petition which is filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive petition."

Certificate of appealability (COA) requirement in habeas cases does not preclude appeal if the district court relies on procedural grounds to dismiss the petition. 28 U.S.C.A. § 2253(c).

To obtain a certificate of appealability (COA), a habeas petitioner must make a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. 28 U.S.C.A. § 2253(c).

> Where a district court has rejected a habeas petitioner's constitutional claims on the merits, the petitioner, to obtain a certificate of appealability (COA), must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. 28 U.S.C.A. § 2253 (c).

The district court first denied Petitioner's motion on the grounds of timeliness, a procedural ground. Pursuant to the lower court's own case law cited in its dismissal of the motion, and subsequent denial of certificate of appealability, the issue then becomes whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C.A. § 2253(c), Slack, supra. The error concerning sentencing is alone enough for reversal. The failure of the court appointed attorney to promote the defense of incompetency alone is enough for reversal. When these two issues are considered in light of the facts, the age and sophistication of the co-defendant whom Petitioner was housed with prior to and during the plea, Petitioner's plea of guilty obviously was not voluntary and made based on a competent decision. This was a denial of due process, a federal constitutional right. 28 U.S.C.A. § 2254.

The court appointed attorney's performance was outside the range of professionally competent assistance in light of all the circumstances. U.S.C.A. Const. Amend. 6.

The court appointed attorney failed to investigate the facts and give consideration to viable theories, and failed to develop the evidence to support those theories. U.S.C.A. Const. Amend. 6. Evidence existed that the Petitioner was incompetent and not only influenced but was fearful of and intimidated by his co-defendant who was, if not a member of the "Bloods," associated with them and was extremely street wise. Petitioner's plea was also made under duress because of these facts. Petitioner was a rural Arkansas boy some three years younger than the co-defendant. These facts, although acknowledged by the lower court, were totally ignored by Petitioner's court appointed counsel.

Cox v. Norris, 133 F.3d 565 (8th Cir. 1997) cited by the lower court, states in part:

> To grant certificate of appealability in habeas corpus case, court must find substantial showing of denial of federal constitutional right. 28 U.S.C.A. § 2254.
>
> In analyzing ineffective assistance of counsel claim with respect to attorney performance, court must determine whether, in light of all the circumstances, lawyer's performance was outside range of professionally competent assistance. U.S.C.A. Const. Amend. 6.
>
> In context of ineffective assistance of counsel claim, "reasonable performance" includes adequate investigation of facts, consideration of viable theories, and

> development of evidence to support those theories. U.S.C.A. Const. Amend. 6.
>
> To show prejudice supporting ineffective assistance of counsel claim, defendant must show that, but for counsel's deficient performance, there is reasonable probability that result of proceeding would have been different, and "reasonable probability" is probability sufficient to undermine confidence in outcome. U.S.C.A. Const. Amend. 6.

Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997), cited by the district court, held:

> Prosecutor's allowing victim to testify that defendant was arrested for assault, rather than on outstanding traffic warrants, did not deprive defendant of due process, where defendant had opportunity to cross-examine victim, to object to her testimony, or to call his own witnesses, jury did ultimately hear that defendant was arrested for unpaid fines, and record included defendant's criminal record, which contained two past convictions for assault. U.S.C.A. Const. Amend. 14.

Because of the court appointed attorney's advice to plead guilty, the Petitioner was not afforded the opportunity to cross examine witnesses, object to testimony, or call his own witnesses, psychiatrists who would have testified to his incompetency and the

sophistication of the co-defendant and his influence over Petitioner. This was a denial of Petitioner's constitutional right to due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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